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Be Careful What You Promise Employees Who Leave Your Employment

By *Angela Bohmann* | March 5, 2015 in *ERISA and Other Benefits Litigation, Welfare Plans*

Clients sometimes like to ease the transition for employees who are retiring or whom the client would like to encourage to leave. One strategy is to continue the employee “on payroll” for a period of time with the expectation that all benefits will remain in place. However, the practice makes benefits lawyers nervous because the benefits that are supposed to continue may be offered under plans that do not recognize an employee who has stopped working as eligible for continued benefits.

Consider the situation of this recent federal appeals court [decision](#). On November 3, Edward retired as an executive. He had accrued several weeks of PTO that the employer continued to pay through November 27. On November 8 he injured his back deplaning from his private aircraft and was later diagnosed with multiple myeloma. Edward applied for short-term and long term disability under the employer’s plan. The insurance carrier denied both claims on the grounds that Edward was no longer in “Active Service” at the time of the injury and so was not eligible for benefits. His “vacation” did not extend benefit eligibility.

Under the insurance policy, “Active Service” was defined to mean that the Employee was working on a full-time basis or was on a vacation or holiday if the Employee was working on the preceding regularly scheduled work day. Edward agreed that he was not working on the day of his injury, but said that he was on vacation and had worked on the preceding scheduled work day.

The insurance company had the right to decide claims under the policy and concluded that Edward was not on vacation. Rather, by November 8 he had retired. There was no expectation that he would return to work after the vacation so he was not in “Active Service” and did not have coverage for the injury.

I counsel my clients to remember that they typically do not provide benefits such as health, life, and disability on their own. There is typically an insurance carrier involved. Even if a health plan is self-funded, there is usually a stop loss carrier to pay high claims. Employers promising continued coverage to retirees or other terminating employees should make sure that the language of the insurance policies and plans support the promise. (Side note: Sometimes tax code provisions can also affect continued coverage. For example, a retirement like that described above is likely to be considered a “separation from service” under Section 409A of the tax code, which may affect when deferred compensation payments should begin.)

In this case, Edward did not recover from the insurance carrier and had not sued the employer. If the employer had promised continued benefit coverage, it is possible that the employer could have been found liable to Edward for the benefits that the carrier was not obligated to pay.

Lesson to employers: Do not promise benefits beyond what your plan documents and insurance policies provide. If you do, you may find yourself paying those benefits without the insurance coverage you were expecting.

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